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Supreme Court, U.S.
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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Did the D.C. Circuit err in holding that Congress has the power under the Copyright Clause to extend retroactively the term of existing copyrights?
2. Is a law that extends the term of existing and future copyrights "categorically immune from challenge[] under the First Amendment"?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit were petitioners Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., American Film Heritage Association, Moviecraft, Inc., Dover Publications, Inc., and Copyright's Commons, and Janet Reno in her official capacity as Attorney General of the United States and her successor, John D. Ashcroft. None of these parties is either publicly held or affiliated with an entity that is so held. The Eagle Forum Education and Legal Defense Fund, L. Ray Patterson, Laura N. Gasaway, and Edward Walterscheid, as well as the Sherwood Anderson Literary Estate Trust, Sherwood Anderson Foundation, the American Society of Composers, Authors, and Publishers, AmSong, Inc., the Association of American Publishers, Inc., Broadcast Music, Inc., the Motion Picture Association of America, the National Music Publishers' Association, Inc., the Recording Industry Association of America, Inc., and the Songwriters Guild of America appeared as *amici curiae* in the Court of Appeals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 239 F.3d 372, and is reproduced in the appendix to the petition ("Pet. App.") at 1a. The order denying the petition for rehearing and for rehearing en banc (Pet. App. 24a) is reported at 255 F.3d 849 (2001). The memorandum opinion of the district court (Pet. App. 34a) is reported at 74 F. Supp. 2d 1 (1999).

JURISDICTION

The judgment of the Court of Appeals was issued on February 16, 2001. Petitioners filed a timely petition for rehearing or rehearing en banc, which the Court of Appeals denied on July 13, 2001. The petition for certiorari was filed on October 11, 2001. The Court granted the writ on February 19, 2002 and amended the grant on February 25, 2002. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Copyright and Patent Clause confers upon Congress the power:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

U.S. CONST. art. I, § 8, cl. 8.

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.* amend. I.

The pertinent provisions of the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, Title I, 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 301-304), and the other copyright laws cited in this petition are reprinted in the appendix to the petition (Pet. App. 54a-67a) and the addendum to this brief.

STATEMENT OF THE CASE

This case is about the limits on Congress's Copyright Clause power, both internal to its enumeration in Article I, and under the constraints imposed by the Free Speech and Press Clause of the First Amendment.

1. The Constitution gives Congress the power to "promote the Progress of Science" by granting "exclusive Right[s]" to "Authors" for "limited Times." U.S. CONST. art. I, § 8, cl. 8. Congress now regularly escapes the restriction of "limited Times" by repeatedly extending the terms of existing copyrights—eleven times in the past forty years.[1] These blanket extensions were initially short (one or two years). In 1976, the extension was for nineteen years. Pub. L. No. 94-553, § 304(a), 90 Stat. 2573-74. In the statute at issue in this case, the Sonny Bono Copyright Term Extension Act (CTEA or Act), Pub. L. No. 105-298, Title I, 112 Stat. 2827, Congress has extended the term of existing and future copyrights by an additional twenty years. *Id.* § 102(b)&(d), 112 Stat. 2827-28 (amending 17 U.S.C. §§ 302, 304).

2. CTEA extends the duration of copyrights within the basic framework of the 1976 Act, which itself changed the system for calculating copyright duration. Before the 1976 Act, duration was a fixed term (28 years), renewable once. Act of March 4, 1909, ch. 320, § 23, 35 Stat. 1080. The 1976 Act replaced the 1909 system with a dual system for calculating terms. Under this new system, the basic term for authors was the life of the author plus 50 years, but for works made for hire, and anonymous or pseudonymous works, the term was 75 years. Pub. L. No. 94-553, §§ 302-304, 90 Stat. 2572-76 (1976).

CTEA extends both types of terms, retroactively as well as prospectively. For any work published before January 1, 1978,

[1] *See* Pub. L. No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, Title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 94-553, § 304, 90 Stat. 2572 (1976); Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998); *see also* Pet. App. 42a-58a (reprinting statutes). This pattern is substantially different from the history of copyright during the Republic's first 150 years. In the first hundred years of federal copyright regulation, Congress extended the terms of copyrights once. Act of February 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439. In the next fifty years, Congress again extended the terms only once. Act of March 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1080-81.

and still under copyright on October 27, 1998, CTEA extends the copyright term to 95 years. Pub. L. No. 105-298, § 102(b)(1), 112 Stat. 2827. For work created on or after January 1, 1978, the term depends upon the nature of the "author." If the "author" is a natural and known person, then the term is extended to the life of the author plus 70 years. *Id.* § 102(b)(1)&(2), 112 Stat. 2827. If the author is a corporation (under the work made for hire doctrine), or is anonymous or pseudonymous, then the term is the shorter of 95 years from the year of first publication, or 120 years from creation. *Id.* § 102(b)(3), 112 Stat. 2827. *See generally* 17 U.S.C. § 302(a).

Thus, because of CTEA, works authored from 1923 on, which would initially have begun to fall into the public domain in 1998, will now remain under copyright until the end of 2018 at the earliest—a term of 95 years, unless extended again. Because of CTEA, future copyrights will now extend for the life of the author plus 70 years, or for works made for hire, 95 years, unless extended again. These terms contrast with the Framers' initial term of 14 years, renewable once if the author survived. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124. As applied to an author who produced throughout a long lifetime in the pattern of Irving Berlin, the current rule would produce a term of 140 years.

3. Petitioners are various individuals and businesses that rely upon speech in the public domain for their creative work and livelihood. Most of the petitioners are commercial entities that build upon the public domain. Best known in this group is Dover Publications, a large-scale publisher of high-quality paperback books, including fiction and children's books. J.A. 18-19. Prior to CTEA, Dover had planned to republish a number of works from the 1920's and 1930's, including "The Prophet" by Kahlil Gibran and "The Harp-Weaver" by Edna St. Vincent Millay. J.A. 19. CTEA has delayed the entry of these works into the public domain by 20 years. *Id.*

Other petitioners engaged in commercial ventures face a similar constraint. Petitioners Luck's Music Library, Inc. and Edwin F. Kalmus & Co., Inc. specialize in selling and renting classical orchestral sheet music. J.A. 16-17. Both sell to thousands of customers worldwide, including many community

and scholastic orchestras. J.A. 16. Both had made preparations to release new sheet music for work that was to pass into the public domain in 1998. This included the work of Bela Bartok, Maurice J. Ravel, Richard Strauss. J.A. 16-17. Those plans have been blocked for 20 years.

Petitioners Higginson Book Company and Tri-Horn International publish historical works that draw upon the public domain. Higginson Book Company specializes in genealogy, historical maps, and local and county histories. J.A. 14. It reprints works that are in the public domain or with the permission of copyright holders. Because of the expense of tracing copyright ownership, Higginson must often wait until works pass into the public domain. *Id*; *see also* J.A. 14-15 (describing example). Tri-Horn sells products relating to the history and traditions of golf. J.A. 15. Because of the nature of this content, it is often difficult, if not impossible, to identify the copyright owner of this material. As a consequence, although prior to CTEA Tri-Horn expected to be able to release works based on golfers Bobby Jones and Walter Hagen, it has postponed its plans to do so. J.A. 15-16.

The American Film Heritage Association is a non-profit film preservation group. It represents documentary filmmakers and other commercial organizations who oppose copyright term extensions because of their significant adverse effects on film preservation. J.A. 17-18. Moviecraft, Inc. is a related commercial entity that depends upon old film for its business. J.A. 18. Much of this film is "orphaned" because current copyright holders cannot be identified, and all of it is now decaying because of the unstable properties of nitrate-based film and even so-called "safety" film. *Id.*; *see* Brief of *Amici* Hal Roach Studios & Michael Agee at 11-12 ["Agee Br."]. Moviecraft restores these old films when they pass into the public domain, but under CTEA no films will pass into the public domain for 20 years. J.A. 18.

Petitioners also include noncommercial individuals and entities that depend upon the public domain. Jill Crandall was a choir director at St. Gregory the Great Episcopal Church, in Athens, Georgia. J.A. 15. The high cost of sheet music for

copyrighted works forced her to select much of her music from work within the public domain. *Id.*; *see also* J.A. 16 (noting that Luck's Music sells some public domain works for half the amount charged for renting copyrighted pieces). Before CTEA, she had planned to perform work by Ralph Vaughan Williams and Edward Elgar. Under CTEA, these works will be unavailable for another generation. J.A. 15.

Lead petitioner, Eric Eldred, is a noncommercial publisher of existing works and a creator of new derivative ones.[2] In 1995, Eldred founded an Internet-based press, Eldritch Press. J.A. 12. Eldritch Press creates free versions of public domain works for the World Wide Web, as well as works for which he has obtained permission. These works are coded in the hypertext markup language (HTML) that underlies the Web. Eldred's press specializes in collections of Hawthorne, Oliver Wendell Holmes, Sr., and Henry James, among others. J.A. 12-14.

Eldred's creations are both copies and derivative works. J.A. 12-13. By using the technology of the Internet, he is able to build texts that are available freely around the world. By integrating search technologies and links, his texts enable students and scholars to study these works in ways that would be impossible with printed books. *Id.* In this sense, Eldred is building a library of public domain works, but with a technological capacity far exceeding that of the ordinary library.

Unlike a library, however, every part of an online collection is potentially regulated by copyright law. Because each posting of a work is technically a "copy," each posting is within the reach of the Copyright Act. In contrast, a library benefits from the "first sale doctrine," which assures that once a book is sold, that copy can be retransferred and even redistributed free of continuing

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[2] Other noncommercial activities affected by CTEA are described in the briefs of *amici*. *See, e.g.*, Brief of *Amici* Internet Archive *et al.* at 1 (libraries and internet archives) ["Internet Archive Br."]; Brief of *Amici* American Ass'n of Law Libraries *et al.* § III.A (historical and cultural preservation projects and scholarly research) ["AALL Br."]; Brief of *Amici* College Art Ass'n *et al.* at 3-16 (educational programs and materials, scholarly works, paintings, novels, art books, dramatic performances, anthologies, and historical publications).

control by the copyright owners. 17 U.S.C. § 109(a). Libraries can therefore build their collections free of ongoing regulation by copyright law. If the Derry New Hampshire Public Library, for example, wanted to build a special collection of the works of by Robert Frost, including his 1923 book of poems "New Hampshire," it could simply purchase copies of those works and make them available to the public. For Eldred to compile the same collection, he would have to secure the permission of the Frost estate. Eldred's need for a rich public domain is therefore greater than the need of an ordinary library.

The impact on the Internet of the copyright extensions being challenged here is the concern of many of the *amici* in this case. *Amicus* Brewster Kahle, for example, through his "Internet Archive," has stored copies of the entire Internet over the past 6 years. With Rick Prelinger, Kahle has also built an archive of public domain movies which will make film available in a digital form to viewers and filmmakers around the world. The technical capacity of this archive is limited only by the number of machines linked to the network. *See* Internet Archive Br. § II.C. But the regulatory constraints of copyright cannot be so easily overcome. The copyright owners of many of these films cannot even be identified. Their work thus cannot be made available on the Internet. Again, were Kahle and Prelinger to build the same archive off the Internet, their licensing costs would be much lower, but their ability to spread knowledge would be more restricted as well. A similar point is raised by *Amici* College Art Association *et al.* on pages 15-16 of their brief. The ability of educators, museum professionals, and librarians to educate depends upon the ability to use creative work. Extensions of copyright terms increase the cost of that education, and restrict the scope of knowledge these professionals can convey.

Petitioners have been harmed because of the delay that CTEA has inflicted on their ability to build upon and use content. Copyright law had, in effect, vested in these petitioners, as well as in the public, a remainderman interest in the works at stake. CTEA took that remainderman interest, and vested it in the current copyright holder. As a consequence, work that was

promised to pass into the public domain at the end of 1998 has now been withheld until 2019, with no assurance that in 2019 it will not be withheld again.

Some numbers will put this change in context. Between 1923 and 1942, there were approximately 3,350,000 copyright registrations. Approximately 425,000 (13%) of these were renewed.[3] The Congressional Research Service ("CRS") estimated that of these, only 18%, or approximately 77,000 copyrights, would constitute "surviving works"—works that continue to earn a royalty. The annual royalties for one segment of those surviving works, books, music, and film (which total 49,001 in the CRS study) will be, CRS estimates, approximately $317,000,000 (in 1997 dollars). Edward Rappaport, *Copyright Term Extension: Estimating the Economic Values*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 8, 12, 15, 16 (May 11, 1998). This means that in order to give the holders of less than 50,000 copyrights $317,000,000 in annual royalties, CTEA has blocked for two decades the entry into the public domain of more than 375,000 other works. Or put differently, because of CTEA, the public will *both* have to pay an additional $317 million annually in royalties for the approximately 50,000 surviving works, and be denied the benefits of those and 375,000 other creative works passing into the public domain in the first 20 years alone. (Today, the proportions would be far more significant, since there is no "renewal" requirement that moves over 85% of the works copyrighted into the public domain. Under current law, 3.35 million works would be blocked to protect 77,000.)

4. In January 1999, petitioners filed a facial challenge to CTEA, arguing that the retroactive aspect of CTEA exceeded Congress's power under the Copyright Clause, and that the ret-

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[3] U.S BUREAU OF THE CENSUS, STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 606 (1965); THE LIBRARY OF CONGRESS, 65 ANN. REP. OF THE REG. OF COPYRIGHTS 16 (1963); THE LIBRARY OF CONGRESS, 70 ANN. REP. OF THE REG. OF COPYRIGHTS 26 (1968); THE LIBRARY OF CONGRESS, 73 ANN. REP. OF THE REG. OF COPYRIGHTS 20 (1971).

roactive and prospective aspects of CTEA violated the Free Speech and Press Clauses of the First Amendment. J.A. 1, 4-26. Standing was based on the harm petitioners have suffered, and the threat of prosecution under the No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678. J.A. 7, 10. On a motion by the United States for judgment on the pleadings, the District Court dismissed the complaint. Pet. App. 34a-39a.

Petitioners appealed the Copyright Clause and First Amendment claims to the Court of Appeals for the D.C. Circuit. Over the dissent of Judge Sentelle, the court affirmed the District Court's judgment. Pet. App. 1a-23a.

The court rejected petitioners' First Amendment argument. While it held that petitioners had standing to raise a First Amendment challenge to both the prospective and retroactive aspects of CTEA, Pet. App. 4a-5a, the court held the substance of petitioners' claim barred by circuit precedent and this Court's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539 (1985). Pet. App. 5a-8a. According to the circuit court, this authority establishes that there is no "first amendment right to exploit the copyrighted works of others." Pet. App. 8a. By challenging a statute that extends the term of copyrights, the court concluded, petitioners were "by definition" asserting a First Amendment right to exploit the copyrighted works of others. Pet. App. 6a-8a. Indeed, according to the circuit court, "copyrights are categorically immune from challenges under the First Amendment." Pet. App. 6a.

The Court of Appeals also rejected petitioners' Copyright Clause claims. The court rejected petitioners' argument that the term "limited Times" should be read in light of the requirement that Congress "promote the Progress of Science." Pet. App. 10a-11a. The court held instead that this text does not restrict or even influence the scope of Congress's power at all. *Id.* Under the lower court's rule, an extension (or multiple extensions) of a "limited" term was permissible so long as each extension itself was limited. Pet. App. 10a-14a. The court also rejected petitioners' argument that CTEA violated the "originality" requirement of *Feist Publications v. Rural Telephone Service Co.,* 499 U.S. 340 (1991). Pet. App. 8a-10a.

Judge Sentelle dissented from the panel's decision with respect to the "limited Times" claim. Pet. App. 16a-23a. Following this Court's approach in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), he reasoned that a court must be able to discover the "outer limits" to a power granted Congress. Pet. App. 17a. To do that, Judge Sentelle asked whether "the rationale offered in support of [the extension of power] has any stopping point." *Id.* The answer was "no." The government had argued that any individual extension, no matter how repeatedly conferred, would be constitutional so long as each was for a fixed length. Pet. App. 18a-19a. That "rationale," Judge Sentelle reasoned, led to an "unlimited view of the copyright power"—just the same sort of "unlimited view" this Court had "rejected with reference to the Commerce Clause in *Lopez*." Pet. App. 17a.

Instead, Judge Sentelle maintained, the proper limit to Congress's power is found by "[r]eturning to the language of the clause itself"—in particular, its "grant of a power." Pet. App. 18a. Interpreting that language, Judge Sentelle wrote:

> [I]t is impossible that the Framers of the Constitution contemplated permanent protection, either directly obtained or attained through the guise of progressive extension of existing copyrights. . . . Extending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time.

Pet. App. 18a-19a.

5. Petitioners filed for rehearing and rehearing en banc. J.A. 3. The panel declined rehearing, and the D.C. Circuit denied rehearing en banc. Pet. App. 24a-27a. Judge Sentelle, joined by Judge Tatel, dissented from the denial of rehearing en banc. Pet. App. 28a-29a.

SUMMARY OF ARGUMENT

"The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

This case is about one important limit on the legislature's power that Congress has clearly "forgotten." The Copyright Clause gives Congress the power to "promote the Progress of Science," by granting "exclusive Right[s]" to "Authors" "*for*

limited Times." U.S. Const. art. I, § 8, cl. 8 (emphasis added). There is no mystery about what the Framers had in mind for the duration of copyright—they expected it would be "short" so that after a "short interval," creative work would pass into the public domain "without restraint." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 557, at 402-03 (reprinted with introduction by R. Rotunda & J. Nowak eds., 1987). Nor is there any doubting the Framers' fear about the power that they were creating: the resolution against monopolies was as strong in the framing generation as in any time since; they, more than we, were keenly sensitive to the dangers of state-backed monopolies.

But their hope was that the government might help spur learning and innovation. And to balance their hope against their fears, the Framers crafted the most carefully circumscribed power within Article I, § 8. The Copyright Clause is the only power in Article I that specifies both its ends—"to promote the Progress of Science"—and also its means—"by securing for limited times . . . exclusive Right[s]." Monopolies were to be allowed, but only to "promote [] Progress."

Congress has now found a way to evade this constitutional restraint. Rather than granting authors a fixed (i.e., "limited") term of copyright, Congress has repeatedly extended the terms of existing copyrights—eleven times in the past forty years. These extensions are for works that have already been created. They are not grants that require any new creation in return.

These repeated, blanket extensions of existing copyright terms exceed Congress's power under the Copyright Clause, both because they violate the "limited Times" requirement and because they violate this Court's "originality" requirement. They violate the "limited Times" requirement, first, because terms subject to repeated, blanket extensions are not "limited"; second, because a term granted to a work that already exists does not "promote the Progress of Science"; and third, because the grant of a longer term for already existing works violates the Copyright Clause's quid pro quo requirement—that monopoly rights be given *in exchange* for public benefit in return.

Retroactive extensions of the duration of existing copyrights also violate the Free Speech and Press Clauses of the First Amendment. The court below held that copyrights were "categorically immun[e]" from First Amendment scrutiny. That holding is erroneous. Copyright term extensions, like any content-neutral regulation of speech, must be subject to intermediate scrutiny. The government has offered, and could offer, no "important governmental interest" that could satisfy intermediate review. Moreover, even if the government could identify an important governmental interest, it has not (and could not) argue that CTEA was narrowly tailored to such an interest. This Court should therefore strike down the retroactive aspect of CTEA under the First Amendment as well. And because the retroactive aspect of CTEA is inseverable from its prospective aspect, CTEA's entire extension should be set aside.

This Court has never been called upon to interpret the meaning of "limited Times." It has assumed that this constitutional limit has been respected. As Justice Stevens wrote in *Sony Corp. v. Universal City Studios, Inc.*, because "copyright protection is not perpetual, the number of . . . works in the public domain *necessarily* increases each year." 464 U.S. 417, 443 n.23 (1984) (emphasis added). That "necessity" was certainly the Framers' design. It is not Congress's current practice.

ARGUMENT

I. THE COPYRIGHT TERM EXTENSION ACT'S BLANKET RETROACTIVE EXTENSION OF EXISTING COPYRIGHT TERMS EXCEEDS CONGRESS'S POWER UNDER THE COPYRIGHT CLAUSE

The opinion of the Court of Appeals suggests that alone among the enumerated powers, the Copyright Clause grants Congress effectively unbounded authority. Despite this Court's instruction in *United States v. Lopez*, 514 U.S. 549 (1995), *City of Boerne v. Flores*, 521 U.S. 507 (1997), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *United States v. Morrison*, 529 U.S. 598 (2000), that "[t]he powers of the legislature are defined and lim-

ited," and that these limits are "not solely a matter of legislative grace," *Morrison*, 529 U.S. at 616, the Court of Appeals ruled that the most distinctive feature of the Copyright Clause—its grant of power "[t]o promote the Progress of Science"—"constitutes [no] limit on congressional power.'" Pet. App. 10a (quotation omitted). Thus freed from the Constitution's actual text, the Court of Appeals adopted a reading of the term "limited Times" that permits Congress to evade the Framers' clear intent that copyright terms be fixed, and that after a "short interval," creative works pass into the public domain "without restraint." STORY, *supra*, at 402.

This failure to interpret and apply the limits of the Copyright Clause is error enough in light of this Court's longstanding practice interpreting that Clause. No other clause in Article I, § 8 has a longer history of substantive constraints on Congress's power recognized by this Court. *See Wheaton v. Peters*, 33 U.S. 591 (1834) (rejecting common law copyright); *Trade-Mark Cases*, 100 U.S. 82 (1879) (holding trademark law unsupported by Copyright Clause power); *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966) (clause "both a grant of power and a limitation"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (rejecting state law adding patent-like protection); *Feist Publ'ns v. Rural Tel. Ser. Co.*, 499 U.S. 499 U.S. 340, 346 (1991) ("originality" a constitutional requirement).

But especially in light of this Court's clear instruction that enumerated powers are "subject to outer limits," *Lopez*, 514 U.S. at 556-57, and that those limits must be judicially determined, *see Boerne*, 521 U.S. at 557, the refusal to give *any* meaning to the Constitution's plain text ("to promote the Progress of Science") is error. As the Court wrote in *Morrison*, citing *Marbury*, it is so "that . . . limits may not be mistaken or *forgotten* [that] the constitution is written." *Morrison*, 529 U.S. at 607 (citation omitted) (emphasis added). By ignoring the Constitution's text, the Court of Appeals has allowed the Framers' limits to be ignored.

The limits of the Copyright Clause, like the limits of the Commerce Clause, are both express and "inherent in [the] text and constitutional context." *Morrison*, 529 U.S. at 619. As

Judge Sentelle argued in dissent below, to determine their scope, a court must identify a "stopping point" to the enumerated power. Pet. App. 17a (Sentelle, J., dissenting). If the government cannot articulate a practical stopping point to the expansion of Congress's power, then its understanding of that enumerated power is incomplete. *Id.*

In this case, the government could identify no such "stopping point." So long as each extension of copyright terms was itself fixed, the government argued that the constitutional requirement was met. That reading, Judge Sentelle rightly found, renders the constitutional restriction meaningless. "[T]here is no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection." Pet. App. 18a. Indeed, as is demonstrated below (*see infra* pp. 23-28), the government's interpretation creates precisely the destructive incentives that the Framers were trying to avoid. Thus under the principle of enumeration, a different interpretation of "limited Times" is required—one that forbids retroactive extensions of existing terms.

In *Lopez* and *Morrison*, the principle of enumeration supported values of federalism. But there could be no principled reason why federalist limits should be judicially enforced while copyright's limits should not. If anything, the reasons favoring the application of a principle of enumeration to the Copyright Clause are more compelling than its application in the context of federalism. The textual limits are more certain; copyright values intersect with First Amendment liberties; and the political interests are not subject to self-regulation through competition between sovereigns. These reasons explain this Court's long history enforcing the limits of the Copyright and Patent Clause. They reinforce Judge Sentelle's conclusion that the principle of enumeration applies to the Copyright Clause as it does to other limits on federal power.

Petitioners do not argue that there is no room for congressional discretion in setting authors' creative incentives through copyright law. *See, e.g., Pennock v. Dialogue*, 27 U.S. 1, 16-17 (1829) ("this exclusive right shall exist but for a limited period, and that the period shall be subject to the discretion of con-

gress."). But it is "*within the limits* of the constitutional grant [that] Congress may . . . implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." *Graham*, 383 U.S. at 6 (emphasis added). There is no discretion over whether the grant has any limits at all.

Nor do petitioners argue, as the Court of Appeals implied, that "50 years are enough to 'promote . . . Progress,' . . . [but] a grant of 70 years is unconstitutional." Pet. App. 10a. Whether 50 years is enough, or 70 years too much, is not a judgment meet for this Court. But whether extensions for works already created prevent copyrights from being for "limited Times," and exceeds a power to "promote the Progress of Science," *is* a judgment that this Court can appropriately make. The line between *prospective* and *retroactive* extensions is a clear one. If "limited Times" is to have any meaningful content, it is a line this Court must draw.

A. Text and Structure of the Copyright Clause

Petitioners' argument depends fundamentally upon the text, structure and original meaning of the Copyright Clause. The Copyright Clause gives Congress the power:

> [a] To promote the Progress of Science and useful Arts [b] by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

U.S. CONST. art. I, § 8, cl. 8. (brackets added). To help clarify its meaning, petitioners refer to [a] as the *progress* part of the Copyright Clause, and [b] as the *rights* part. (As the "useful Arts" is understood to refer to the patent authority, EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 18 (2002), petitioners refer to the "Progress of Science" only.)

In the context of the framing, the aim of this clause was nothing new. Its structure, however, was distinct. England had passed the Statute of Anne 80 years before; its ideal to "promote learning" was familiar in state legislation of the time. Brief of *Amici* Tyler T. Ochoa *et al.* at 5-6, 11-13 ["Historians' Br."]. That the Constitution would grant Congress the power to

"promote learning" was not surprising. The only genuine question was how.

The answer was a clause that is unique within Article I. The Copyright Clause is the only clause in Article I that "describes both the objective which Congress may seek and the means to achieve it." *Goldstein v. California*, 412 U.S. 546, 555 (1973). That "objective" is identified in the *progress* part of the clause—"to promote the Progress of Science." *Feist,* 499 U.S. at 349 ("primary objective"); *Pennock v. Dialogue*, 27 U.S. at 19 ("main object"). The "means" are enumerated in the *rights* part—"by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings." The two parts together grant Congress the power *to* do X *by* means of Y—*to* promote the Progress of Science *by* exchanging time-limited copyrights to authors for their writings.

1. "*To promote . . . Progress*": The words of the *progress* half of the Copyright Clause have been defined by this Court consistently with the Framers' understanding. "To promote," this Court has said, means "'to stimulate,' 'to encourage,' or 'to induce.'" *Goldstein*, 412 U.S. at 555. "[T]he Progress of Science" means "artistic creativity," *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), "the creative activity of authors," *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 546 (1985) (citing *Sony*, 464 U.S. at 429), "the creative effort," *id.* at 450, "the creation of useful works," *id.* at 558, or simply "creation," *Feist,* 499 U.S. at 347.[4] The aim was

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[4] At the time of the framing, the term "science" did not have our contemporary meaning. Instead, "science" meant "knowledge" or "learning." WALTERSCHEID, NATURE, *supra*, at 125. In contrast, "Progress" did have a sense that is still familiar today. As Samuel Johnson defined the term, "progress" meant "advancement; motion forward" as in this passage from Locke: "The bounds of all body we have no difficulty to arrive at; but when the mind is there, it finds nothing to hinder its progress into the endless expansion," or alternatively, "intellectual improvement; advancement in knowledge." SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (W. Strahan 1755). The latter definition is closest to the framing purpose. Webster's definition is not far from Johnson's: "[t]he action or progress of advancing or improving by marked stages or degrees; gradual betterment; as, assured of his progress; the history of educational progress;

to induce the production of something "new to the world," *Pennock*, 27 U.S. at 20, using a state-granted monopoly "to bring forth new knowledge." *Graham*, 383 U.S. at 8-9.

2. *"By securing for limited Times . . . exclusive Right[s]"*: The technique of the *rights* part of the Copyright Clause was also familiar to the Framers. In exchange for an "exclusive Right" limited in duration, the "Author[]" must produce a "Writing[]." U.S. Const. art. I., § 8, cl. 8. The mechanism is a quid pro quo. *Pennock*, 27 U.S. at 23 (rejecting patent for work released to the public because there "would be no quid pro quo"); *see also Brenner v. Manson*, 383 U.S. 519, 534 (1966) (describing the "basic quid pro quo"). Congress may give authors rights *in exchange for* writings. The clause gives Congress the power to secure a bargain—this for that.[5]

These two parts of the Copyright Clause were plainly meant to function together. The means specified in the *rights* part ("by securing for limited Times . . . exclusive Right") were set against the ends specified in the *progress* part ("to promote the

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specifically progressive development or evolution of mankind, as a process or fact." WEBSTER'S NEW INT'L DICTIONARY 1977 (2d ed. 1950) (4th entry).

[5] This language of "exchange" is uniform throughout the history of the Copyright Clause. The monopoly granted is "the equivalent given by the public for benefits bestowed," *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-28 (1932); it is to "repay[]" the author for what otherwise "would not . . . have existed." *Butcher's Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter House Co.*, 111 U.S. 746, 763 (1884). As Judge Learned Hand described it, the "monopoly [is] in exchange for a dedication" to the public, *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86, 89 (2d Cir. 1940), which this Court held the "States may not render fruitless" by adding new restrictions to the ones that Congress has set. *Bonito*, 489 U.S. at 152. The grant is made upon the "condition" that the work will pass into the public domain upon the copyright's "expiration." *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 185 (1896). The author "impliedly agrees" to this "condition," *id.* at 191-92, as the grant is, as James Madison wrote, "a compensation for a benefit actually gained to the community as a purchase of property." James Madison, *Aspects of Monopoly One Hundred Years Ago*, 128 HARPER'S MONTHLY MAGAZINE 490 (1914). *See generally* Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1162-64.

Progress of Science"), so that the limited purpose for which monopolies could be granted would be clear, and not *"forgotten."* *Marbury v. Madison*, 5 U.S. at 176 (emphasis added). Just as the Necessary and Proper Clause is constrained by the enumerated powers, such that the only power granted by that clause is the power to promote "proper" legislative ends,[6] so too is the *rights* half of the Copyright Clause ("by securing for limited Times . . . exclusive Right") constrained by its enumerated end ("to promote the Progress of Science"). Indeed, the structure of Article I, § 8, cl. 8 mirrors the overall structure of Article I, § 8—the *rights* part of the Copyright Clause stands to the *progress* part as the Necessary and Proper Clause stands to the other enumerated powers.

3. *"Limited Times"*: The duration of the copyright grant was to be "limited." In the framing context, the meaning of "limited" was as plain as it is today. A term is limited if it is "appointed, fixed," "narrow," or "circumscribed." WEBSTER'S NEW INT'L DICTIONARY 1434 (2d ed. 1950); *see also* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (W. Strahan 1755) (defining "to limit": "to confine within certain bounds; to restrain; to circumscribe; not to leave at large"). In the drafting of the Copyright Clause, Charles Pinckney of South Carolina first proposed the term "a certain time." "Certain" was struck, and "limited" was put in its place. *See* III DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 556 (Dep't of State 1900) (Convention, Aug. 18, 1787). "Certain" suggests a fixed, knowable period; "limited" suggests not just that the period be fixed, but that it also be short in duration. STORY, *supra*, at 402 ("a short interval").

B. CTEA's Retroactive Aspect Violates the "Limited Times" Requirement of the Copyright Clause

This Court has never decided whether Congress has the power, consistent with the "limited Times" requirement, to ex-

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[6] *See Printz v. United States*, 521 U.S. 898, 924 (1997) (citing Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297-33 (1993)).

tend the terms of existing copyrights. It is undisputed that, as the government concedes, and both the majority and dissent agreed below, Congress has no power under the Copyright Clause to grant permanent monopolies. Pet. App. 10a. Thus, the sole issue is whether Congress may achieve indirectly what it cannot achieve directly—a perpetual term "on the installment plan." *The Copyright Term Extension Act of 1995: Hearings on S. 483 before the Senate Judiciary Comm.*, 104th Cong. 73 (1995) (statement of Jaszi) [1995 Senate Hearings].

This Court should hold that it cannot. A blanket extension of existing copyright terms violates the "limited Times" requirement because it is (a) not a "limited Time[]," (b) not a "limited Time[]" that "promotes the Progress of Science," and (c) not compatible with the quid pro quo requirement of the Copyright Clause. These three requirements are all confirmed by the history of the framing context. CTEA fails all three.

1. Retroactively Extended Copyright Terms Are Not "Limited"

As described above, the Constitution requires that the duration of a copyright term be "limited." Under the recent practice of Congress—extending the terms of existing copyrights eleven times in the past forty years—copyright terms are no longer "limited." This practice shows that, rather than fixed, or certain, or "limited," terms are perpetually changeable and expandable. Under the reasoning of the Court of Appeals, so long as each extension is for a fixed length, Congress is free to extend copyright terms ad infinitum. Pet. App. 10a-14a.

The consequence is that no author or artist can rely upon work passing into the public domain. *See* Agee Br. at 10 (describing reliance interests). An author who wants to release a counter-story to a famous novel cannot know when (or whether) that novel will pass into the public domain. *See, e.g., Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (suit to enjoin publication of THE WIND DONE GONE). A director who wants to adapt a play in a manner inconsistent with the original author's wish can never know when the author's rights will end. *See* Dinitia Smith, *Immortal Words, Immortal Royalties?*, N.Y. TIMES, Mar. 28, 1998, at B7

(noting that Gershwin's "Porgy and Bess" is only licensed for a Black cast). It is by permitting retroactive extensions that this uncertainty is created, and this uncertainty defeats the Framers' purpose in protecting the public domain. It shows that terms are not "limited."

The government concedes that some limit is necessary. It argued below that "[i]t may well be that some term extensions are so long . . . that a court could conclude that Congress has in effect created an unlimited term." Appellee's Br. 17. But how long is too long? Is 75 years for software "in effect . . . an unlimited term"? As in *Morrison* and *Lopez*, the government promises a limit, but offers no way to find it. On the government's test, "[t]he Congress that can extend the protection of an existing work from 100 years to 120 years, can extend that protection from 120 years to 140; and from 140 to 200; and from 200 to 300." Pet. App. 18a. (Sentelle, J., dissenting).[7]

The uncertainty in this standardless test, and the uncertainty about whether copyright terms expire, means that by any reasonable standard copyright terms are not "limited." On this basis alone, this Court should conclude CTEA exceeds Congress's power, stating a clear and certain test that retroactive extensions are not permitted.

2. Retroactively Extended Copyright Terms Do Not "Promote the Progress of Science"

Because the "limited Times" requirement "stands connected" to the power "to promote the Progress of Science," *Wheaton*, 33 U.S. at 661, its meaning must be determined in light of that specified end. *Id.* The Court of Appeals declined to do this. It expressly "rejected the argument 'that the introduc-

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[7] There are, to be sure, always line-drawing problems. But it was in part in response to them that the Court in *Lopez* and *Morrison* emphasized also a categorical limit to Congress's power under the Commerce Clause: in *Lopez* the Court emphasized that the law had "nothing to do with the regulation of commercial activity," 514 U.S. at 577, and in *Morrison* that "our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. Similarly here, the retroactive extension in the Act violates the Constitution not only as a matter of degree, but also of kind. It crosses the line of any plausible limit.

tory language of the Copyright Clause constitutes a limit on congressional power.'" Pet. App. 10a.

The conclusion of the Court of Appeals is plainly erroneous. This Court has consistently interpreted the scope of Congress's Copyright Clause power in light of the requirement that Congress "promote the Progress of Science." Indeed, there is no way to make sense of this Court's most significant Copyright Clause cases, *except* in terms of the language and inherent restrictions of the *progress* part of the Copyright Clause.

In *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), for example, this Court unanimously confirmed that the copyright power may only be deployed to protect work that is "original." "Originality is a constitutional requirement," *id.* at 346, "the sine qua non of copyright." *Id.* at 345. Because of this requirement, Congress is not permitted to grant copyright protection to the mere statement of "facts," or to works within the "public domain." *Id.* at 350.

Yet the term "original" does not appear in the text of the Copyright Clause. Nor is this restriction explained by reference to the words "Authors" or "Writings" alone. *Cf. Trade-Mark Cases, supra* (explaining restriction). As this Court defined the term, "[o]riginal . . . means only that the work was independently created by the author (as opposed to copied from other works), *and that it possesses at least some minimal degree of creativity.*" *Feist,* 499 U.S. at 345 (emphasis added). While the requirement that the work be "independently created by the author" might derive from the requirement that copyright be granted to "Authors" for "*their* Writings" (emphasis added), the additional requirement that it "possess[] at least some minimal degree of creativity" necessarily depends upon the concept of "progress" set forth in the first half of the Copyright Clause. For example, abstracted from the clause as a whole (as the Court of Appeals read the term "limited Times"), there would be no violence done to the word "Author" by referring to the compiler of a book of discount and interest rate tables as an "author." Nor would there be error in calling that book a "writing." But a book of discount and interest rate tables is not an "original" work under *Feist*, because a report of "facts" is not the "creation" of the facts reported. Tyler T. Ochoa, *Patent*

and Copyright Term Extensions and the Constitution: A Historical Perspective, 49 J. COPYR. SOC'Y USA 19, 47, 51 (2002) (describing example and *Feist*). *Feist's* requirement of "some minimal degree of creativity" can only be explained in light of the requirement that copyrights "promote the Progress of Science." *Accord* WALTERSCHEID, NATURE, *supra*, at 396-97.

The same conclusion follows from this Court's repeated insistence that Congress may not use its power under the Copyright Clause to "remove existent knowledge from the public domain." *Bonito*, 489 U.S. at 146, citing *Graham*, 383 U.S. at 6 (patents); *Feist,* 499 U.S. at 350 (copyrights). There is no "public domain" clause in the Copyright Clause, and absent the requirement that patents "promote the Progress of . . . useful Arts," there is no textual reason why Congress today could not grant a patent to an "Inventor" for his "Discover[y]" just because that discovery has already passed into the public domain. There would be no misuse of the terms "Inventor" and "Discoveries," for example, if Congress today restored a patent to Thomas Edison (and hence his heirs) for his 1923 patent relating to disk phonograph record production (patent no. 1,546,573), which entered the public domain over half-a-century ago. Yet as this Court has held, in light of the "limitations" built into the clause, "monopolies" are not permitted under the Copyright Clause when there is no "concomitant *advance* in the 'Progress of Science and useful Arts.'" *Bonito*, 489 U.S. at 146 (emphasis added). Instead, as the Court has instructed, "*[t]his is the standard expressed in the Constitution,*" "*and it may not be ignored.*" *Graham,* 383 U.S. at 6 (emphasis added).

These restrictions on Congress's power make sense only in light of the requirement that Congress "promote the Progress of Science." They are consistent with a long line of authority that reads the power of Congress under the *rights* part of the Copyright Clause in light of the ends identified in the *progress*

part.[8] They manifest a consistent method for interpreting Congress's power to grant monopoly *rights* under a power to promote *progress*. That same method should apply to the term "limited Times."

So interpreted, a term would be a "limited Time[]" if it "stimulate[s]," *Goldstein*, 412 U.S. at 555, "the creative activity of authors," *Sony*, 464 U.S. at 429. It follows that a blanket extension of existing copyrights cannot be a "limited Time[]" that "promote[s] the Progress of Science." It cannot, because the incentive is being given for work that has already been produced. Retroactive extensions cannot "promote" the past. No matter what we offer Hawthorne or Hemingway or Gershwin, they will not produce anything more. Retroactive extension might promote harmonization—CTEA does not (*see infra* pp. 43-44) but a hypothetical statute could. It might increase the reward to heirs of long-dead authors. It might even induce some to restore decaying films—though again, petitioners deny that CTEA does so, and deny that that alone is a sufficient interest. *See infra* pp. 44-45. These alternative ends might well be actual or legitimate. But they are *not* the ends specified in the *progress* half of the Copyright Clause. *Whatever else* a

[8] *See Pennock v. Dialogue*, 27 U.S. at 19 (Story, J.) (patent would "materially retard the progress of science and the useful arts"); *Kendall v. Winsor*, 62 U.S. 322, 328 (1858) (same); *Clayton v. Stone*, 5 F. Cas. 999, 1003 (C.C.S.D. N.Y. 1829) (No. 2,872) (Thompson, J.) ("object [of statute] was the promotion of science"); *Baker v. Selden*, 101 U.S. 99, 105 (1879) (relying on *Clayton*); *Higgins v. Keufel*, 140 U.S. 428, 430 (1891) (act read in light of purpose); *Sony Corp.*, 464 U.S. at 477 (rejecting copyrights "in which strict enforcement . . . would inhibit the very 'Progress of Science and Useful Arts' that copyright is intended to promote"); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts . . . '"); *see also Frantz Mfg. Co. v. Phenix Mfg. Co.*, 457 F.2d 314, 327 n.48 (7th Cir. 1972) ("The congressional power . . . is likewise limited to that which accomplishes the stated purpose of promoting 'the Progress of Science and useful Arts'") (Stevens, J.); ARTHUR W. WEIL, AMERICAN COPYRIGHT LAW 31 (1917) ("Copyright acts must be passed for the promotion of the progress of science . . . [and] for this purpose only").

monopoly protection under that clause may do, it must promote "creative activity" to satisfy the limits of the Constitution. *Sony*, 464 U.S. at 429.

3. Retroactively Extended Copyright Terms Violate the Quid Pro Quo Requirement of the Copyright Clause

The text and structure of the *rights* part of the Copyright Clause ("by securing for limited Times to Authors . . . exclusive Right") imbeds a quid pro quo. Congress may make a trade—it may grant an "exclusive Right" for a "limited Time[]" *in exchange for* a "Writing" by an "Author." It may not handout a monopoly over speech in exchange for nothing—*quid pro nihilo*. This was the Framers' clear understanding, confirmed by this Court in its cases interpreting Congress's Copyright Clause power. *See supra* p. 16 & n.5.

The retroactive aspect of CTEA violates this requirement of exchange. Whatever material benefit might flow to the author or his heirs or publisher from the extension of this exclusive right, Congress has not conditioned that grant upon a gain by the public. The grant is thus a windfall, not an incentive. Rather than "a compensation for a benefit actually gained to the community as a purchase of property," Madison, *Aspects of Monopoly*, *supra*, at 490, CTEA is simply a boon to the heirs of copyright holders. It thus violates the core of the quid pro quo built into the Copyright Clause.

Congress certainly has the power to grant such windfalls through tax benefits, or outright gifts. But its Copyright Clause power is contingent upon an exchange. As nothing is received by the public in exchange for, or conditioned upon, the retroactive extension, CTEA is beyond Congress's power.

4. The Historical Context Confirms that a Blanket, Retroactive Extension Exceeds Congress's Power

The Framers had a purpose in crafting the Copyright Clause as carefully, and uniquely, as they did. Petitioners' interpretation of "limited Times" makes sense of that purpose. The Court of Appeals' interpretation does not. Indeed, the interpretation

of the court below *exacerbates* the very problem that the Framers were trying to avoid.

The Framers drafted the Copyright Clause against the background of English experience with monopolies in general, and with publishing monopolies in particular. Their clear aim was to avoid the "corruption" experienced with both. Royal abuse of the Crown's prerogative to grant monopoly had been a major cause of the English Civil War. *See, e.g.,* CHRISTINE MACLEOD, INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660-1800, at 16 (1988). By the time of the framing, England had restrained the excesses of the Crown's monopolistic practices generally, and weakened the monopolistic control the London publishers held on learning. Both experiences meant that the Framers "were not about to give the Congress any general power to create monopolies," WALTERSCHEID, NATURE, *supra*, at 95, nor any specific power to grant monopolies (such as the Copyright and Patent Clause) unless carefully limited.

Of particular concern was the Crown's practice of granting monopolies for objects or items of trade that were already in existence. As this Court has explained, the clause "was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public." *Graham,* 383 U.S. at 5; *see also* George Ramsey, *The Historical Background of Patents*, 18 J. PAT. OFF. SOC'Y 6, 7 (1936) ("during [Elizabeth's] Reign patents were granted that were monopolistic in character and covered most of the necessities of life"). King Henry VIII issued a printer's patent for the Bible. Roger Syn, *Copyright God: Enforcement of Copyright in the Bible and Religious Works*, 14 REGENT U. L. REV. 1, 4 (2001). King James I issued a patent for the "sole right of making certain writs in the Court of Common Pleas," as well as for clay pipes, printing ballads and playbills, gold and silver thread, and most famously, playing cards. Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 SW. U. L. REV. 1, 65-66 (2000). Such an unre-

strained monopoly power in America, the Framers believed, would simply create the incentive for the same kind of corruption. Henry H. Permit, Jr., *Electronic Freedom of Information Act*, 50 ADMIN. L. REV. 391, 410 n.131 (1998) ("Some of the revolutionary fervor both for the English revolution and the American one more than a century later came from reaction to perceived corruption associated with the grant of [monopolies]").

The practice of granting monopolies to industries already in existence had an obvious, and deleterious, effect not only on consumer welfare, but on incentives to innovate. "The very possibility of securing exclusive privileges was an invitation to those at court to join in the race for favors." WILLIAM HYDE PRICE, THE ENGLISH PATENTS OF MONOPOLY 16 (1906). That race was not for "new inventions." *Id.* New inventions were "left for poor and often chimerical inventors." *Id.* Instead, the powerful competed for "monopolies in old industries." *Id.*; *see also* Paul S. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1143; DAVID DEAN, LAW-MAKING AND SOCIETY IN LATE ELIZABETHAN ENGLAND: THE PARLIAMENT OF ENGLAND, 1584-1601, at 163-64 (1996). This in turn produced what the Framers referred to as "the spirit of monopoly"—the tendency to look to government for favors and protection in industry rather than to compete with new innovations and creativity. Hall & Sellers, THE PENNSYLVANIA GAZETTE, Feb. 16, 1785, Item No. 71221.

Today, the conduct that the Framers sought to prevent would be called "rent-seeking"—economically inefficient attempts by some private parties to gain advantage through invocations of the political process.[9] The Framers employed a different vocabulary,

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[9] James Buchanan explains the concept and its historical roots:

> Suppose that, instead of discovering a new commodity or service or production process, an innovating entrepreneur discovers a way to convince the government that he "deserves" to be granted a monopoly right, and the government will enforce such a right by keeping out all potential entrants. No value is created in the process; indeed, the monopolization involves a net destruction of value. The rents secured re-

but similarly recognized that governmental grants of exclusive rights for already existing creations served no social end, but merely induced private parties to dissipate "effort, time and other productive resources" in currying lawmakers' favor. TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 8 (James Buchanan, Robert Tollson & Gordon Tullock, eds., 1980).

This danger was a particular concern for the Framers in the context of copyright. Until the Statute of Anne (1710), copyright in England had been perpetual. Historians' Br. at 5-6. After the Statute of Anne limited the copyright term, publishers continued to insist that their common law copyright remained perpetual, the Statute of Anne notwithstanding. Not until 1774 was this question finally resolved against the publishers. *Donaldson v. Beckett*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774). But by that time, publishers had achieved a strong control over the publication of new works, fueled by their monopolistic control over the publication of old works. The Framers feared that publishers in America would achieve the same power over learning that they held in England. Marci Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655, 659 (1996). They therefore crafted the Copyright Clause so as to "prevent the formation of oppressive monopolies." *Aiken*, 422 U.S. at 164.

Their technique was familiar—a "mechanism[] [for] decentralizing and controlling power." Marci Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, 5 OCCASIONAL PAPERS INTELL. PROP. FROM BENJAMIN N. CARDOZO SCH. L., YESHIVA U. 6 (1999). Just as the Framers had responded to fear about federal power (federalism), and to fear about the power of the church (the Establishment Clause), "[t]he Framers' solution [to the fear about concentrated power in publishers] was to divide power, to demarcate its limits, and

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flect a diversion of value from consumers generally to the favored rent seeker, with a net loss of value in the process.
TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 7 (James Buchanan, Robert Tollson & Gordon Tullock, eds., 1980).

to establish mechanisms that would guard against [its] aggrandizement." *Id.* Thus, unlike the Statute of Anne, the Copyright Clause gave Congress the power to vest copyrights in "Author[s]," not "booksellers." 8 Anne, ch. 19, § 1 (1710). The "English experience," Professor Patterson has written, "caused the framers . . . to exclude publishers from the copyright clause." L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 32-33 (1987). The Copyright Clause is thus not so much "pro-author but rather anti-publisher."[10] Hamilton, *Historical and Philosophical Underpinnings, supra*, at 8. By securing copyrights to "Authors" who individually would never control the market generally, and by securing those rights for just "limited Times," the Framers established a mechanism to staunch the concentration of power over speech in the hands of a historically suspect few.

Against the background of these concerns over corruption, and over the concentration of power in the hands of publishers,[11] this Court should apply a meaning of "limited Times" that would achieve the Framers' purpose. The Copyright Clause would achieve that end if read to prohibit an indefinite and endless power to extend existing terms.

The interpretation by the court below does not achieve this end. Contrary to the Framers' intent, under the reading of the Court of Appeals, "publishers" retain a perpetual incentive to lobby Congress to extend existing terms. The incentives to de-

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[10] Milton had a view of those publishers that was shared generally: "old patentees and monopolizers in the trade of bookselling, men who do not labour in an honest profession to learning is indetted." PHILIP WITTENBERG, THE PROTECTION OF LITERARY PROPERTY 31 (1968) (citing JOHN MILTON, AREOPAGITICA & OF EDUCATION 43 (Kathleen Lea ed., 1973)); *see also* L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 178-79 (1968).

[11] These concerns are not simply historical. As the Wall Street Journal wrote, the clear effect of "leaving [CTEA] intact will [be to] do nothing more than create an ever-growing cartel of ownership of intellectual property that will stifle the continuing growth and spread of ideas." *Unfair Use*, WALL ST. J., Feb. 21, 2002, at A16.

centralize control over speech intended by the Framers are thus erased.[12]

There is no reason that "limited Times" needs to be read to defeat the Framers' plain purpose. A plain meaning of the term, in light of the structure of the clause, and consistent with the history of its interpretation, yields a result that would achieve the Framers' ends. An interpretation of "limited Times" banning blanket retroactive extensions of the duration can eliminate (a) the incentive to lobby for extended terms, (b) the tendency to concentration, and (c) an excessive reliance by those publishers on works from the past to the exclusion of the new.

5. The Copyright Act of 1790 Gives No Support to Congress's Retroactive Extension of Copyright Terms

The Court of Appeals suggested that, because the First Congress in its first copyright act granted copyrights to works "already printed," it itself "extended the terms of existing copyrights," Pet. App. 13a-14a, and so must have considered permissible extensions such as the one challenged here. This argument is plainly mistaken.

The Copyright Act of 1790 did not extend the terms of existing copyrights. As this Court "has repeatedly said, [the 1790 Act] did not sanction an existing right, but created a new one." *Fox*, 286 U.S. at 127; *see also Mazer v. Stein*, 347 U.S. 201, 214-15 (1954); *Wheaton*, 33 U.S. at 661. The federal copyright was the replacement for whatever rights—state statutory copyrights, or common law copyrights—might have existed prior to the 1790 statute.

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[12] Indeed, between the interpretation of "limited Times" proposed by the Court of Appeals and a perpetual term, a perpetual term would better avoid the incentives to corruption that were at least part of the Framers' concern. At least with a perpetual term, there would be no need repeatedly to direct resources towards Congress to secure a continuing monopoly right as there had been in England to secure monopoly favor. *See* ROBERT B. EKELUND & ROBERT D. TOLLISON, MERCANTILISM AS A RENT-SEEKING SOCIETY: ECONOMIC REGULATION IN HISTORICAL PERSPECTIVE 18 (1981).

The need for this replacement was obvious to the first Congress, in light of the general and continued confusion about whether there was a common law copyright, and in light of the states' decision (at the request of the Continental Congress) to create state law copyrights. U.S. COPYRIGHT OFFICE, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT, BULLETIN NO. 3, at 1-21 (rev. ed. 1963); L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 183 (1968). Although this Court in 1834 concluded in the *Wheaton* case that there was no common law copyright that protected an author after a work was published, *see supra* p. 12, it is clear from the mix of state statutes granting state law copyrights, as well as from the variously expressed views of different Framers and contemporaneous legal authority, that at the time the Constitution was enacted, the matter was at least uncertain. Edward C. Walterscheid, *Inherent or Created Rights: Early Views on the Intellectual Property Clause*, 19 HAMLINE L. REV. 81, 87 (1995); WALTERSCHEID, NATURE, *supra,* at 76; *see also* 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 477 (1953) ("the Common Law of the United States . . . was in a highly uncertain state on the subject of copyrights"). Rawle believed there were common law copyrights in the United States as late as 1825. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 102 (1825). And Congress in its first major revision of copyright law in 1831 treated copyright as a creature of natural law—mistakenly, as *Wheaton* would show. 7 GALES AND SEATON'S REGISTER OF DEBATES IN CONGRESS 424 (21st Cong., 2d Sess. 1831) ("merely the legal provision for a protection of a natural right").

In light of this uncertainty, the first Congress was fully justified in granting authors and proprietors of "already printed" works a federal copyright to replace any common law or state granted copyright the work might possess. The Framers' aim was to terminate any conflicting state or common law claims. CROSSKEY, *supra,* at 477. The federal grant can thus be understood as a *compensation* for the expected displacement of a

state-protected right. *Accord* WALTERSCHEID, NATURE, *supra,* at 436-38.

It is therefore simply incorrect to infer from the 1790 Act that the Framers envisioned a general exception to the rule that "exclusive Rights" were to "promote [] progress." The statute of 1790 stands for nothing more than the need of the First Congress to address fundamental issues of transition from a state federation to a national government. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 (1995) (citing Justice Story's account of conceptual problems of a transition to a federal government). That they chose this relatively uncumbersome method (as opposed to the formal surrender of a right in the context of patents, *see* Act of February 21, 1793, ch. 11, § 7, 1 Stat. 322) does not demonstrate a general principle permitting the blanket extension of the term of existing copyrights.

To be sure, a rule against retroactive copyright extensions would cast into doubt the 1831 and 1909 Acts, and possibly the 1976 Act. All three can be distinguished from CTEA.[13] As petitioners have argued, the 1831 statute was the product of what this Court determined in 1834 to be a mistaken understanding of the nature of the copyright power. *See supra* p. 29. The 1909 and 1976 statutes simply followed the examples that preceded them. Never during this time was any court asked to rule on the

[13] The 1831 Act extended, both prospectively and retrospectively, the initial term from 14 to 28 years (and left the renewal term at 14 years). Act of Feb. 3, 1831, § 2, 16. In order for a new work to receive a copyright, however, the Act imposed several requirements, including depositing a copy of the work with the federal government for recording and paying a fee. *Id.* § 4. Similar prerequisites were imposed under the predecessor statute, the Act of 1790, Act of May 31, 1790, § 3, as amended by Act of April 29, 1802, ch. 36, 2 Stat. 171, which would have applied to the copyrights whose terms the 1831 Act retroactively extended. Similarly, the 1909 Act extended the renewal term to 28 years for both existing and future copyrights. Act of March 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1080-81. This extension did not automatically benefit every eligible author, however. In order to obtain a renewal term of 28 years, an author (or his heirs) had to properly file an application for renewal in the Copyright Office. *Id.* These requirements had the salutary effect of keeping registrations of existing and protected work. No comparable requirements exist under CTEA or current copyright law.

constitutionality of the retroactive extensions under the "limited Times" clause. Neither can the extension in 1831 be attributed to the Framers (no Framer sat in Congress in 1831), nor can two extensions in 150 years be held to be a constitutionally ratified practice. *Cf. Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) (deference for "[t]he construction placed upon the constitution by the first act of *1790* and the act of *1802*, by the men *who were contemporary with its formation*") (emphasis added). Whether or not two extensions in 150 years are excusable, the eleventh in forty years must be held to have crossed the line.

6. If Retroactive Extensions Are Not Per Se Invalid, They Must at a Minimum Be Tested for "Congruence and Proportionality" to the Ends of the Copyright Clause

Petitioners advance a *per se* rule banning blanket retroactive extensions of copyright terms. Just as the "originality requirement" bans all grants of copyright to works that are not "original," this rule would ban blanket retroactive extensions of copyright terms as not being terms that are "limited." Such a rule would provide clarity and certainty for both copyright holders and those building upon the public domain.

Even if this Court does not adopt this rule, however, Congress must not be left to define on its own the limits the Constitution sets. At a minimum, this Court should adopt a rule of heightened review, requiring that any extensions be "congruent and proportional" to proper Copyright Clause ends. This Court recognized a similar standard in *City of Boerne* where it wrote that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" for legislation passed pursuant to § 5 of the 14th Amendment to pass constitutional review. 521 U.S. at 508. The same structure can guide the Court in enforcing the limits of the Copyright Clause.

Like the power to enforce the 14th Amendment in § 5, the power to "secure for limited Times to Authors . . . exclusive Right[s]" is a *means* to a constitutionally specified *end*—to "promote the Progress of Science." Like § 5, the power to "se-

cure for limited Times" also contains language in the "affirmative grant of congressional power [that] also serves to limit that power." *Kimel*, 528 U.S. at 81. Accordingly, as with § 5, this Court should ensure that Congress does not exceed its power to "secure for limited Times" by granting "exclusive Right[s]" where there is no proportional Copyright Clause benefit.

The need for some form of heightened review is particularly clear in this case. The Court of Appeals offered just one justification for the retroactive extension of existing copyrights—that it would create incentives to restore old films. Pet. App. 13a. Petitioners would contest the factual premise of the court's judgment. *See infra* pp. 44-45. As *Amicus* Agee argues, it is the extension of copyright terms that create the transaction costs making restoration impossible. Agee Br. at 10-17. But even if the court below were correct, the notion that the need to restore old films could justify an across-the-board extension to all existing copyrights in all media is simply astounding. Just to encourage the preservation of film, a full generation of creative work is denied to another generation of creators.

Therefore, in the alternative, this Court should reverse and remand for consideration by the court below whether the extension of the existing terms challenged here can be shown to be "congruent and proportional" to Congress's legitimate Copyright Clause ends. *See* AALL Br. § III. The government should bear the burden of such a showing, and the court below should reject it if the extension is significantly broader than is necessary to achieve the government's legitimate end. *Cf. Turner Broad. Sys. v. FCC*, 520 U.S. 180, 182 (1997) (speech burden must be "congruent to the benefits") (*Turner II*).

C. The Retroactive Aspect of CTEA Violates the "Originality" Requirement of *Feist*

Independent of CTEA's violation of the "limited Times" provision in the Copyright Clause, its retroactive extension of existing terms violates the "originality" requirement of *Feist*. *Feist* requires that copyrights be granted to works that are "original." While existing works with copyrights affected by CTEA were presumptively original when copyright protection first attached, this Court's precedent shows that the constitutional requirement of "originality" continues beyond that initial vesting. If "the sine qua non of copyright is originality," *Feist*, 449 U.S. at 345, then whenever Congress extends to an "Author" an "exclusive Right," that grant too must be tested for originality.

The authority for this claim is *Feist* itself. *Feist* characterized material "in the public domain" as "not original." *Id.* at 350; *see also Harper*, 471 U.S. at 548 ("copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are *not original*—for example . . . *materials in the public domain*") (emphasis added). But obviously, material in the public domain was, at one point, original. Nathaniel Hawthorne's *The Scarlet Letter* (1850) is in the public domain. If a new copyright could not be granted to it now because it is no longer "original," that is not because it failed to satisfy the requirements of "originality" when written. It must instead be because the requirements of "originality" restrict subsequent grants.

This Court expressed that same understanding in the *Trade-Mark Cases*. In concluding that trademark legislation could not be upheld under the Copyright Clause power, this Court reasoned that trademarks were often granted for expression "already in existence." *Trade-Mark Cases*, 100 U.S. at 94. That fact, the Court held, put trademarks beyond the scope of the "Authors" and "Writings" intended to be covered by the Copyright Clause. Even though some of these marks were plainly, at one point at least, "Writings" by some "Author," the Court found they were not sufficiently "original" to merit a new grant of statutory protection.

The same reasoning should apply to retroactive extensions of existing copyright terms. Such extensions are granted for works that are "already in existence." *Id.* at 94. Like works in the public domain, these works may once have been "original"; but like works in the public domain, they are "original" no longer. Thus, under the reasoning of *Feist* and the *Trade-Mark Cases*, the retroactive aspect of CTEA is beyond Congress's power for this reason as well.

II. CTEA'S BLANKET RETROACTIVE AND PROSPECTIVE EXTENSIONS OF COPYRIGHT TERMS ARE NOT IMMUNE FROM FIRST AMENDMENT SCRUTINY

Even if Congress were found to have authority under the Copyright Clause to extend copyright terms without regard to their effect upon the "Progress of Science," CTEA violates the Free Speech and Press Clauses of the First Amendment. Under ordinary principles of First Amendment review, the restrictions on speech effected by both extensions greatly outweigh any plausible free speech benefit. The Court of Appeals held otherwise only by declining to apply any First Amendment scrutiny at all to the challenged extensions. Stating that Congress's mere decision to place works under copyright, regardless of the strength or weakness of its justification, "obviates further inquiry under the First Amendment," Pet. App. 7a, the court below announced the novel rule that "copyrights are categorically immune from challenges under the First Amendment." Pet. App. 6a. That ruling was in error.

A. *Harper & Row* Does Not Exempt Copyright Statutes from First Amendment Review

In categorically dismissing petitioners' free speech claims, the court below erroneously relied upon this Court's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), treating *Harper & Row* as an "insuperable bar[]" to a First Amendment challenge to any copyright statute. Pet. App. 5a. *Harper & Row*, however, is no such thing.

In *Harper & Row*, this Court declined to craft "a public figure exception to copyright" that would have expanded beyond recognition the exception already recognized for fair use. 471 U.S. at 560. Harper & Row had an exclusive right to President Gerald Ford's autobiography. The Nation Magazine "scooped" part of that autobiography without Harper & Row's consent. In defending against an infringement action, The Nation argued that because President Ford was a "public figure," and his pardon of President Nixon was of significant public import, free speech values should trump Harper & Row's copyright interests, forcing an exception to the enforcement of an otherwise valid and pre-existing copyright.

The Nation Magazine did not argue that Harper & Row's copyright was invalid, that the law granting Harper & Row's copyright was unconstitutional, or that copyright law could not properly extend to works about public figures. Instead, it simply asserted that it had a First Amendment right to trespass on Harper & Row's exclusive right.

This Court properly rejected The Nation's argument. By creating an incentive to produce speech that otherwise would not be produced, the Court explained, copyright functions as an "engine of free expression." 471 U.S. at 558. If a work lost that protection simply because it became important, or because it was about a public figure, that would destroy much of the speech-inducing effect that copyright law produced. *Id.* This would defeat the purpose of copyright protection. Thus, so long as copyright law protects expression rather than "facts or ideas," and so long as it preserves space for "fair use," this Court found "no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright." *Id.* at 560.

This Court's refusal to carve out a public figure exception to the scope of copyright in *Harper & Row*, however, plainly did not establish a general First Amendment immunity for all copyright statutes. At most, the case established a presumption against the need to engage in a First Amendment analysis every time a *copyright owner* seeks to enforce his copyright against an infringer. *Id.* But nothing in *Harper & Row* suggests that *Congress* could evade First Amendment review should it amend the copyright statute to eliminate the idea/expression distinction or to constrict the scope of fair use. Nor would *Harper & Row* immunize from First Amendment review a copyright act that was content-based simply because it reached expression only. (If France, for example, adopted a statute banning copyright for "hate speech," and Congress sought to "harmonize" with that rule, *Harper & Row* would not preclude First Amendment review.) *Harper & Row* simply applied the First Amendment to the existing exceptions for ideas and fair

use, and found them sufficient to satisfy the requirements of the Free Speech and Press Clauses on the merits. Nothing in *Harper & Row* obviated the need for First Amendment inquiry into whether a copyright law has permissibly struck the balance between copyright and free speech at the outset.

The First Amendment interests raised by copyright's duration are in any event distinct from the First Amendment interests raised by the scope of protection enjoyed during the term of a copyright. *Harper & Row* held that copyright law is justified by substantial content-neutral interests that make copyright "an engine of free expression," 471 U.S. at 558, *so long as* it creates a market in authors' expression and does not give an author a property right in his ideas, *see id.* at 560; *id.* at 582 (Brennan, J., dissenting), and *so long as* the "fair use" exception limits the scope of a copyright owner's control over his expression. *Id.* at 560.

The idea/expression and fair use limitations, however, are irrelevant to the First Amendment interests protected by limitations on the duration of copyright. The whole point of the Framers' directive that terms be "limited" was that copyrighted works would pass into a public domain where they would "admit the people at large . . . to the full possession and enjoyment of all writings and inventions without restraint." STORY, *supra,* at 402-03. The constitutional interest in the public domain is an interest in guaranteeing access not just to the author's ideas but also his expression. The idea/expression distinction cited in *Harper & Row* and relied on by the court below by definition cannot protect this interest.

Likewise with the limitations of "fair use." As this Court explained,

> [A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such *noncommercial* uses would merely inhibit access to ideas without any countervailing benefit.

Sony, 464 U.S. at 450-51 (emphasis added). By contrast, a limitation of the duration of copyright enables both commercial and non-commercial actors to vindicate First Amendment interests in drawing upon the creator's work. The purpose of the public domain—the default state that copyright is temporarily permitted to alter—is to free material for any kind of use. As "fair use" does not extend the benefit of use to commercial and non-commercial actors alike, it is insufficient to vindicate the Framers' objective in limiting copyright terms.

In sum, *Harper & Row* does not bar First Amendment scrutiny of extensions of copyright terms. To the contrary, the injury to vital First Amendment interests caused by elongating copyrights should be reviewed under the very same standard that *Harper & Row* announced and applied: that copyright law may be upheld against First Amendment challenge insofar—but only insofar—as it protects an "engine of free expression," *Harper & Row,* 471 U.S. at 558, and it should be invalidated if its restrictions "merely inhibit access to ideas without any countervailing benefit." *Sony*, 464 U.S. at 450-51. The decision of the court below to bypass the First Amendment entirely was therefore plain error.

B. CTEA Is a Content-Neutral Regulation of Speech Subject to Intermediate Scrutiny under the Standard of *Turner*

By barring the unauthorized use or dissemination of copyrighted works, copyright law regulates speech. To be sure, copyright law is content-neutral speech regulation, for its sole purpose is to provide an economic incentive for authors to produce "original" work, without regard to the content of the material protected, the viewpoint of the author, or the subject matter of the speech. *See, e.g., CBS Broad., Inc. v. EchoStar Communications Corp.,* 265 F.3d 1193, 1211 (11th Cir. 2001) (copyright law is content-neutral speech regulation), *petition for cert. filed*, 70 U.S.L.W. 3626 (Mar. 28, 2002) (No. 01-1450); *Satellite Broad. & Communications Ass'n v. FCC*, 275 F.3d 337, 355 (4th Cir. 2001) (same), *petition for cert. filed*, 70 U.S.L.W. 3580 (Mar. 7, 2002) (No. 01-1332); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 450-51 (2d Cir. 2001) (same); *see also* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 47-54

(2001). But there can be no dispute that copyright law prevents willing speakers who would adapt or distribute copyrighted works from reaching willing audiences. It is regulation "in derogation of common right," as Jefferson's attorney general, Levi Lincoln, said of patents. Levi Lincoln, *Patents for Inventions, 26 May 1802*, *reprinted in* 3 THE FOUNDERS' CONSTITUTION 41 (P. Kurland & R. Lerner eds., 1987). It is therefore speech regulation.

The significance of this speech regulation has only increased over time. The scope of the monopoly that the government confers under the copyright laws has expanded dramatically over the nation's history, and with it the severity of copyright's interference with freedom of speech. The "exclusive Right" of which the Framers spoke was little more than an unfair competition law, directed exclusively against publishers, reaching only the right to "publish, republish, and vend" a particular writing, and lasting for just 14 years, renewable once. Act of May 31, 1790, § 1, 1 Stat. 124. In the two centuries since, Congress has expanded this "exclusive Right" to cover "copying" as well as publishing, to regulate derivative as well as original works, and to last often for more than a century. The consequence is that authors now may bar translations, abridgments, dramatizations, performances, and other uses of copyrighted works that the Framers left unregulated. *See* 17 U.S.C. § 106; Netanel, *supra*, at 16-17. And now, because of the emergence of the Internet (and the technological fact that every interaction in the context of the Internet makes a "copy" of something), copyright law will increasingly control ordinary uses of creative content in activities that before the Internet were not even remotely within the reach of copyright. *See, e.g.*, L. Ray Patterson & Judge Stanley F. Birch, *Copyright and Free Speech Rights*, 4 J. INTELL. PROP. L. 1, 3 (1996) ("New technology provides new means [to] enable[] the copyright owner to control access"); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, *supra*, at 48 ("copyright owner's right to control access to the work far exceeds what could have been imagined in 1841").

These changes are not necessarily improper. But they must be tested against unchanging principles—that speech regulations go no further than is necessary to achieve important governmental interests. Accordingly, like any other form of content-neutral regulation that tries to balance free speech interests "on both sides of the equation," *Turner II*, 520 U.S. at 227 (Breyer, J., concurring), CTEA should be subject to intermediate scrutiny under the First Amendment. Like cable regulation (which restricts the free speech rights of cable operators in order to balance speech rights of viewers, *see Turner II, supra*), or privacy regulation (which "directly interfere[s] with free expression . . . [in order] to protect . . . an interest . . . 'in fostering private speech,'" *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring)), copyright regulation restricts the reach of the public domain in order to fuel an "engine of free expression" by authors. But like all regulation that allocates the right to speak among speakers, copyright regulation too must be justified under intermediate review. *Cf. Turner Broadcasting v. FCC*, 512 U.S. 622, 675-76 (1994) (describing speaker-based regulation subject to intermediate scrutiny) (*Turner I*).

C. CTEA's Retroactive Extension of Copyright Does Not Satisfy Intermediate Scrutiny

CTEA can withstand First Amendment review only "[1] if it advances important governmental interests unrelated to the suppression of free speech and [2] does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189; *see also United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying intermediate scrutiny to time, place, and manner regulation of speech in the public forum); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 537 (1987) (applying *O'Brien* review to a law protecting the word "Olympic" under trademark law).

In *Turner*, this Court suggested that the "important governmental interests" advanced to sustain such regulation must have been Congress's at the time it legislated. As the Court wrote, a reviewing court must "assure that, in formulating its

judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner I*, 512 U.S. at 666; *Turner II*, 520 U.S. at 195. But whether this Court limits itself to what Congress considered, or considers anew any interest the government could have advanced, CTEA cannot sustain the burden of intermediate review. The "mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation" from First Amendment review, 512 U.S. at 640, and Congress engaged in little more than "assertion" in this case.

Indeed, as we now show, the legislative record falls so far short of *Turner*'s requirements that this Court may review CTEA under the *Turner* standard and deem it invalid on its face without remand.[14]

1. CTEA Fails to Advance an "Important Governmental Interest"

In the court below, the government did not advance any interest in retroactive copyright extension that it claimed would satisfy intermediate scrutiny. Nor could it, for the only content-neutral interest that this Court has recognized as sustaining copyright's speech restrictions—namely, providing incentives to authors to create original works, *Harper*, 471 U.S. at 558—is irrelevant once a work has been created. *See* Pet. App. 32a-33a; Brief of *Amici* Akerlof *et al.* at 3-9 ["Economists' Br."] The other reasons the government might advance for CTEA's

[14] Because the prospective extension of copyrights in CTEA is inseverable from the retroactive, *see infra* § III, the prospective extension stands or falls under the First Amendment with the strength of the justification for the retroactive extension. Alternatively, this Court should strike the retroactive extension and remand for an evidentiary hearing under the *Turner* standard on the prospective extension.

Because the court of appeals found CTEA immune from First Amendment scrutiny, it did not conduct the *Turner* balancing. Accordingly, our petition sought only a remand on the First Amendment claims. However, in its opposition, the Government broadened the second question to include the merits of the First Amendment claim, and therefore we believe that the Court may consider it. As Part III of this brief demonstrates, a remand is necessary to consider the non-severability of the prospective CTEA extension from the retroactive extension.

retroactive extension of the duration of copyright are all either illegitimate, insignificant, or hypothesized after the fact in violation of *Turner*'s actual purpose requirement. None is substantial enough to outweigh the free speech burden upon those who have long relied on the expectation that the "limited Times" requirement would assure that works would enter the table domain.

a. *Income to heirs*: The government argued below that Congress's desire to secure a longer economic return to aged living authors and dead authors' heirs is a sufficient justification for the retroactive extension of terms under rational basis scrutiny. *See* Appellee's Br. at 22-28. But windfall benefits for the economic well-being of authors and their heirs *independent of any claimed incentive to create* cannot constitute a legitimate, much less an important or substantial, governmental interest sufficient to justify a restriction of speech. Whatever their permissibility elsewhere in the legislative lexicon, naked wealth transfers between speakers are forbidden by the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

By retroactively extending copyright terms, Congress is directly re-allocating the right to speak. It is choosing favored speakers (including rightly-beloved speakers, such as Disney, or the estate of Robert Frost) and disfavoring other speakers who would, but for this regulation, be permitted to develop derivative works, or perform free of the restrictions of copyright. Such speech restrictions for the benefit of some speakers at the expense of other speakers and listeners, if unrelated to the incentive to create, are no more sanctioned by the First Amendment than a tax on CNN to benefit C-SPAN. *Cf. Turner I*, 512 U.S. at 676 (O'Connor, J., dissenting) (noting that a "preference for broadcasters over cable programmers" that was "justified with reference to content" rather than market incentives would be subject to strict scrutiny under the First Amendment).

b. *Speech promotion*: The only justification this Court has ever recognized for restricting speech in order to benefit

authors has been the incentives that restriction produces to create more speech. *See* Rebecca Tushnet, *Copyright as a Model for Free Speech Law*, 42 B.C. L. REV. 1, 35-67 (2000); Netanel, *supra*, at 26-30. Such an incentive to create could qualify as an "important governmental interest" *if* Congress could reasonably have believed that the restriction it imposed through CTEA's retroactive copyright extensions actually advanced the incentive to create. But no such plausible inference is possible when the extension is granted long after the moment of creation or in many cases after the author's own death.

The government argued below that a windfall to the heirs of creators, and to companies that hold copyrights, might inspire them to produce new, creative work that they otherwise would not have created. *See* Appellee's Br. at 37. Were this true, it might well constitute an "important governmental interest." But Congress had before it no evidence whatever that creators' heirs or corporate holders of copyrights are more likely to make creative use of earlier work than those who, like petitioners, have eagerly awaited that work's entry into the public domain. Neither is there any such evidence. Nor is there any logical reason to conclude that such windfalls would increase creativity. When copyright is offered as a quid pro quo, the conferral provides an important incentive. But when an extension is granted without a quid pro quo, there is no change in incentives to produce. Economists' Br. at 8-10; ROBERT L. BARD & LEWIS KURLANTZICK, COPYRIGHT DURATION 59-63, 81-84 (1999). The extension is a windfall, pure and simple, not an "engine of free expression." There is no more reason to believe the heirs of Gershwin will use this windfall to produce new work than that they will use it to fund a longer vacation. As Congressman Hoke stated, in support of CTEA, "I think it's a sham to try to hang on the theory that we're creating incentives." *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248, and H.R. 1734 Before the Subcomm. on Courts and Intell. Prop. of the House Comm. on the Judiciary*, 104th Cong., 420 (1995) (Statement of Rep. Hoke) [1995 House Hearings].

c. *Harmonization with international regimes*: The government has also argued that harmonization with European copyright terms provides a rational basis for the retroactive extension of terms. With respect to existing works, however, the only effects that harmonization might possibly have are (1) reducing the transaction costs for commercial use of copyrighted work, or (2) increasing income to authors and their heirs. The second interest is insufficient for the reasons already given. The first interest is not one that CTEA plausibly advances, and even if it did, it would be insufficiently substantial to satisfy intermediate review.

The government has yet to demonstrate any meaningful sense in which CTEA "harmonized" copyright terms. Nor could it, for CTEA in fact does no such thing. As the Register of Copyrights, Marybeth Peters testified, the bill "does not completely harmonize our law with the [EU directive]. In some cases, the U.S. term would be longer; in others the EU terms would be." 1995 House Hearings, *supra*, at 197. Scholars agreed that CTEA would achieve no harmonization between American and global property regimes. *Id.* 305 (statement of Professor Karjala); 349 (statement of Professor Patry); 382-87 (statement of Professor Reichman); *see also* Copyright Law Professors Br. at 16-20; BARD & KURLANTZICK, *supra*, 191-93, 198-200 nn. 276-77. Indeed, as many noted, CTEA actually *increases* the disharmony between American and EU law. *See, e.g.*, -1995 House Hearings, *supra*, at 372 (statement of Prof. Reichman) (noting that CTEA would "unilaterally worsen the existing disparities").

The fantasy of alleged "harmonization" is apparent from even a cursory review of the statute. The only categories of work that CTEA harmonized are works by non-corporate authors after 1978. Every other category of published copyrighted work has either not been harmonized, or has had its dissonance increased. *See* Dennis J. Karjala, *Harmonization Chart*, http://makeashorterlink.com/?R2FB432E (mapping out difference between U.S. and EU law) (reprinted in Addendum at 15a-19a). Six out of twenty categories of copyright are actually *less* harmonized now than they were prior to CTEA. *Id.* In

no meaningful sense, then, can CTEA be said to harmonize terms.

Even with respect to the work of non-corporate authors after 1978, however, the government has yet to show how the change from life plus 50 to life plus 70 increased harmonization from a global perspective. There are 76 countries today with a life plus 50 regime but only 26 with life plus 70. *See* National Copyright Legislation, http://www.unesco.org/culture/copy. CTEA, thus, moved the United States from the dominant world standard to a minority one. The copyright term within the United States is therefore actually less harmonized with foreign copyright terms today than before CTEA and in important categories even less harmonized with EU policy.

But even assuming CTEA did actually harmonize terms, the only possible benefit from harmonization *itself* is a reduction in the transaction costs of copyright licensing. Congress made no showing—nor could it—that the transaction costs in calculating terms were interfering with the creation of copyrighted work. But even if it could, merely increasing administrative convenience has never been deemed a sufficiently substantial governmental interest to satisfy intermediate review. As this Court has held in parallel contexts, the reduction of administrative burdens is not an "important governmental interest" that could satisfy any standard more demanding than mere rationality review. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (holding "any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience," violates equal protection). Nor should such an interest, even if found credible, be found substantial here.

d. *Preservation of existing works*: Finally, the government has argued, and the Court of Appeals found below, that CTEA's retroactive extension of copyright would provide an incentive "to preserve older works, particularly motion pictures in need of restoration." Pet. App. 12a.

Were there any substantial evidence in the legislative record to support the belief that longer terms would increase the incentives of holders of "older works" to restore them, this might

well be an "important governmental interest." (It would not, however, constitute a Copyright Clause interest if the restored work were not "original." *Feist, supra.*). But as *Amici* College Art Association *et al.* demonstrate, there was absolutely no credible evidence presented to Congress upon which this Court could rely to conclude that CTEA would spur restoration. *See* College Art Ass'n Br. at 19-20. Indeed, as *Amici* Agee exhaustively demonstrates, extended terms *reduce* the likelihood that films will be restored. More often than not, the most significant barrier to restoring and distributing old films is the legal barrier caused by old and untraceable copyrights. *See* Agee Br. at 14-17. The large number of "orphaned" films described by the Librarian of Congress testifies to the costs of extended terms. Report of the Librarian of Congress, *Film Preservation 1993: A Study of the Current State of American Film Preservation* 5-10 (1993). These are films that cannot be restored and distributed by the copyright owners because the owners cannot be identified. Increased terms only increase this cost. *See* AALL Br. at 21-25; Agee Br. at 15-17; College Art Ass'n Br. at 5-10. There is no way, on the legislative record actually compiled, that this Court could conclude that Congress found to the contrary on the basis of substantial evidence.

2. CTEA Burdens Substantially More Speech than Necessary

Even if the government could demonstrate that CTEA advanced an important governmental interest in speech promotion or preservation, the law burdens far more speech than necessary to achieve such interests. While a content-neutral "regulation need not be the least speech-restrictive means of advancing the Government's interests," *Turner I*, 512 U.S. at 662, the requirement of intermediate scrutiny is not satisfied when a "substantial portion of the burden on speech does not serve to advance" the important governmental interest. *Id.* at 682 (O'Connor, dissenting). "That some speech within a broad category causes harm . . . does not justify restricting the whole category." *Id.*

The example relied upon by the Court of Appeals—the supposed incentive to film preservation—is the clearest case of such

excessive overbreadth. Based on the figures provided by the Congressional Research Service, it can be estimated that approximately 19,000 films under copyright from 1923-42 have been affected by CTEA. Of these, 5,000 would continue to earn royalties and survive to expiration. Rappaport, *supra*, at 15. If the interest advanced by the government is that films that would not have been restored will now be restored because of CTEA, then it could only be a portion of the remaining 14,000 films.

Yet even if CTEA produced enough incentive to restore all of these films, there is no reason for CTEA to reach beyond these films to *all copyrighted material*, including books, magazine articles, works of art, music and musical recordings, plays, and other artistic creations bearing no relation whatever to the physical properties of decaying celluloid film. More than 400,000 works are affected by the extension of CTEA in its first 20 years. *See supra* p. 7. The preservation of even 15,000 films could not possibly justify the exclusion of willing speakers and listeners from use of more than 400,000 other creative works. Congress may not "burn the house to roast the pig." *Butler v. Michigan,* 352 U.S. 380, 383 (1957). A restriction of all existing copyrights just to save a relatively tiny number of films restricts "substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

In any event, Congress could easily have achieved the same alleged pro-speech benefit by conditioning the extension of copyright upon the copyright holder's restoration of the endangered work. By granting an extension that is unconditional, Congress not only provides a weak incentive for copyright holders to restore these old works, but also creates a legal thicket ensuring that no one else can restore these works either. As the Librarian of Congress testified, the vast majority of old, early films needing preservation have copyrights that are held by unknown entities. *Redefining Film Preservation: A National Plan; Recommendations of the Librarian of Congress in Consultation with the National Film Preservation Board* 25 (1994). These "orphaned works" cannot be released because the copyrights cannot be cleared. Here the law serves no function ex-

cept to block access to creative works. A more narrowly tailored restriction could have avoided this harm.

The same problem with extreme overbreadth affects each of the other alleged governmental interests that might be asserted in CTEA's defense. If international harmonization is an important governmental interest, then it would only justify extensions that actually harmonized terms, or harmonization for foreign works only, or harmonized prospectively. CTEA's extensions do not. If the incentive to heirs of authors or holders of copyright were an important governmental interest, then Congress could have conditioned the grant upon new creativity. There was no need to grant a windfall rather than the traditional quid pro quo. And finally, if income to heirs of authors were a legitimate, much less an important, governmental interest, then Congress could have adopted the proposal of the Congressional Research Service to make any extension contingent upon the payment of a user fee. Then only owners of copyrights in works generating an estimated income exceeding the user fee would pay the fee. Rappaport, *supra*, at 17-20. The balance of the copyrighted works would have passed into the public domain.

On the legislative record actually compiled in Congress, it is impossible to conclude that Congress could rationally have found CTEA's blanket retroactive copyright term extension narrowly tailored to increasing speech or any other important governmental interest. This Court should therefore find the retroactive aspect of CTEA unconstitutional, and strike down its prospective aspect as inseverable (see Part III below).

3. At a Minimum, the First Amendment Requires Reversal and Remand for Development of an Evidentiary Record

If this Court cannot conclude on the record before it whether CTEA survives intermediate scrutiny under the First Amendment, then it should remand this case to the District Court to hold a *Turner* hearing to consider the evidence. While petitioners have requested intermediate scrutiny throughout this litigation, neither the District Court nor the Court of Appeals conducted any First Amendment review whatever. As a consequence, if this Court believes that CTEA might be justified by some argument not yet

advanced or fully articulated by the government, it should reverse the judgment below and remand with instructions that any such proffered justifications be subjected to intermediate scrutiny as set forth in *Turner*.

III. CTEA'S PROSPECTIVE AND RETROACTIVE EXTENSIONS OF COPYRIGHT TERMS ARE INSEVERABLE

If this Court agrees with petitioners that CTEA is unconstitutional in its retroactive extension of existing copyrights, then it must decide how the court below should proceed on remand. While this question is not expressly within the scope of the questions presented, petitioners are bound to advise this Court that under its precedents, the retroactive aspect of CTEA cannot be severed from the prospective aspect. As petitioners argued below, *see* Pl. Summ. J. Mem. at 87-89, § 102 of CTEA must therefore be struck in its entirety.

As this Court has recognized, the standard for severability is "well established: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (citing *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam), quoting *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932)). Of course, "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently." *Alaska Airlines*, 480 U.S. at 684. Moreover, it is impermissible for a court "to give to the words used by Congress a narrower meaning than they are manifestly intended to bear," *Trade-Mark Cases*, 100 U.S. at 98, or "to dissect an unconstitutional measure and reframe a valid one out of it *by inserting limitations it does not contain*." *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (emphasis added).

Although CTEA is silent on the issue of severability, it is immediately apparent on the face of § 102 that it cannot be severed in a way to apply only prospectively to works created *after CTEA became effective*. Subsection (b) contains the relevant portion of § 102 that applies prospectively to works created after CTEA's effective date. Pub. L. No. 105-298, § 102(b). That subsection, however, applies retroactively as well, applying generally to "works created on or after January 1, 1978." *Id.* There is no distinction made in § 102(b) between retroactive or prospective application of CTEA—between works, in other words, that are produced on or after October 27, 1998, and works created before.

Likewise, 17 U.S.C. § 302, the relevant section of the Copyright Act which was amended by § 102(b) of CTEA, suffers from the same flaw: it applies generally to "a work created on or after January 1, 1978" and contains no language whatsoever that can limit CTEA's application *to works created on or after the date CTEA became effective*. Those words simply do not appear anywhere in the provision. To insert those limiting words now is "legislative work beyond the power and function of the court." *Hill*, 259 U.S. at 70. *Cf. Sloan v. Lemon*, 413 U.S. 825, 834 (1973) (statute that gave financial aid to students of nonpublic schools violated Establishment Clause and could not be severed to apply only to nonpublic, nonsectarian schools because "[t]he statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools").[15] As this Court has long recognized, severability cannot be achieved "by inserting [words] that are not now there." *United States v. Reese*, 92 U.S. 214, 221 (1875); *see also Reno v. ACLU*, 521 U.S. 844, 884-85 (1997) ("This Court 'will not rewrite a . . . law to conform it to constitutional requirements.'") (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988)). Accordingly, § 102 of CTEA must be struck in its entirety.

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[15] Even were it permissible for a court to insert limiting words in a statute in place of the ones found there, this Court could not merely insert "works created on or after CTEA became effective" in place of "works created on or after January 1, 1978" in 17 U.S.C. § 302, since to do so would create a gap in the law. There would be no provision in the Copyright Act to set the term duration for works created on or after January 1, 1978 but before CTEA became effective. An entirely new provision would have to be drafted to cover those works—a task which is clearly Congress's.

There is no reason in the text or history of CTEA to suppose that Congress would have enacted the prospective aspect absent its retroactive aspect. Where Congress fails to include a severability clause, and fails to craft the Act to permit severability, there is no warrant for this Court to engage in legislative drafting.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals for the D.C. Circuit and remand to the District Court for further proceedings, holding (1a) that the retroactive aspect of CTEA is beyond Congress's Copyright Clause power, or (1b) that the retroactive aspect of CTEA must be found to be "congruent and proportional" to the relevant Copyright Clause ends; (2) that copyright is not "immune" from First Amendment review, and (2a) that the retroactive aspect of CTEA violates the First Amendment or (2b) that the prospective and retroactive aspects of CTEA must be tested under intermediate First Amendment review; and (3) if the retroactive aspect of CTEA is invalid, then the prospective aspect is invalid because not severable.

Respectfully submitted,

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17 U.S.C. § 301

UNITED STATES CODE
TITLE 17. COPYRIGHTS
CHAPTER 3--DURATION OF COPYRIGHT

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to–

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to–

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

§ 302. Duration of copyright: Works created on or after January 1, 1978

(a) IN GENERAL.–Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

(b) JOINT WORKS.–In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.

(c) ANONYMOUS WORKS, PSEUDONYMOUS WORKS, AND WORKS MADE FOR HIRE.–In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in

records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

(d) RECORDS RELATING TO DEATH OF AUTHORS.–Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of that person's interest, and the source of the information recorded, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent the Register considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

(e) PRESUMPTION AS TO AUTHOR'S DEATH.–After a period of 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefit of a presumption that the author has been dead for at least 70 years. Reliance in good faith

upon this presumption shall be a complete defense to any action for infringement under this title.

§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978

(a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

(b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.

§ 304. Duration of copyright: Subsisting copyrights

(a) COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1978.– **(1)(A)** Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of–

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (other-wise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire,

the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.

(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work–

(i) the author of such work, if the author is still living,

(ii) the widow, widower, or children of the author, if the author is not living,

(iii) the author's executors, if such author, widow, widower, or children are not living, or

(iv) the author's next of kin, in the absence of a will of the author,

shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

(2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which–

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which–

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.

(3)(A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office–

(i) within 1 year before the expiration of the original term of copyright by any person entitled under paragraph (1)(B) or (C) to such further term of 67 years; and

(ii) at any time during the renewed and extended term by any person in whom such further term vested, under paragraph (2)(A) or (B), or by any successor or assign of such person, if the application is made in the name of such person.

(B) Such an application is not a condition of the renewal and extension of the copyright in a work for a further term of 67 years.

(4)(A) If an application to register a claim to the renewed and extended term of copyright in a work is not made within 1 year before the expiration of the original term of copyright in a work, or if the claim pursuant to such application is not registered, then a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright, except that such use does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.

(B) If an application to register a claim to the renewed and extended term of copyright in a work is made within 1 year before its expiration, and the claim is registered, the certificate of such registration shall constitute prima facie evidence as to the validity of the copyright during its renewed and extended term and of the facts stated in the certificate. The evidentiary weight to be accorded the certificates of a registration of a renewed and extended term of copyright made after the end of that 1-year period shall be within the discretion of the court.

(b) COPYRIGHTS IN THEIR RENEWAL TERM AT THE TIME OF THE EFFECTIVE DATE OF THE Sonny Bono Copyright Term Extension Act.–Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.

(c) TERMINATION OF TRANSFERS AND LICENSES COVERING EXTENDED RENEWAL TERM.–In the case of

any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;

(B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them;

(C) the rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that author is dead, by the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this

subsection, or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2), and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of

other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee's

successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

(d) TERMINATION RIGHTS PROVIDED IN SUBSECTION (C) WHICH HAVE EXPIRED ON OR before the effective date of the Sonny Bono Copyright Term Extension Act.--In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Sonny Bono Copyright Term Extension Act for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

(1) The conditions specified in subsections (c)(1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Sonny Bono Copyright Term Extension Act.

(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the

end of 75 years from the date copyright was originally secured.

§ 305. Duration of copyright: Terminal date

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

CHART SHOWING CHANGES MADE BY THE CTEA AND THE DEGREE OF HARMONIZATION ACHIEVED AND DISHARMONIZATION EXACERBATED BY THE SONNY BONO COPYRIGHT TERM EXTENSION ACT (CTEA)*

By Dennis S. Karjala. Created May 15, 2002

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#	Nature of Work and Author	Pre-CTEA Term	Post-CTEA Term	Directive Term in EU	Harmonized?	More or Less?
1	Natural persons >1977	50 PMA	70 PMA	70 PMA	Yes	More
2	Natural persons <1978, works published 1950-1963	28;47	28;67	70 PMA	No	No change
3	Natural persons <1978, works published 1964-1977	75	95	70 PMA	No	No change
4	Natural persons <1978, works published <1950	75 (if still in renewal term on 1/1/78, the effective date of the 1976 Act)	95 (if still in renewal term on 10/27/98, effective date of the CTEA)	70 PMA	No	No change

*The "<" and ">" signs in the Chart mean "before" and "after," respectively. Thus, for example, ">1977" means "after 1977" (or "1978 and beyond"). Also, "PMA" is short for "post mortem auctoris," or past the death of the author. Thus, 70 PMA means the term lasts for 70 years after the death of the author.

#	Nature of Work and Author	Pre-CTEA Term	Post-CTEA Term	Directive Term in EU	Harmonised?	More or Less?
5	Joint Authors >1977	50 PMA (last surviving author)	70 PMA (last surviving author)	70 PMA (last surviving author)	Yes	More
6	Joint Authors <1978, works published 1950-1963	28;47	28:67	70 PMA (last surviving author)	No	No change
7	Joint Authors <1978, works published 1964-1977	75	95	70 PMA (last surviving author)	No	No change
8	Joint Authors <1978, works published <1950	75	95 (if still in renewal term on 10/27/98, effective date of the CTEA)	70 PMA (last surviving author)	No	No change
9	Anonymous or Pseudonymous Authors >1977	Lessor of 75 from publication or 100 from creation	Lessor of 95 from publication or 120 from creation	70 from time made available to public (or 70 PMA if author's name becomes known within 70)	No	Less (or no change if author's name becomes known within 70)

#	Nature of Work and Author	Pre-CTEA Term	Post-CTEA Term	Directive Term in EU	Harmonised?	More or Less?
10	Works made for hire >1977	Lesser of 75 from publication or 100 from creation	Lesser of 95 from publication or 120 from creation	70 PMA (70 if individual author not identified in released version)	No	Less if individual author not identified, otherwise no change
11	Works made for hire <1978 (same as 2, 3, & 4 above)	28;47 (1950-1963) 75 (1964-1977) 75 (<1950)	28;67 (1950-1963) 95 (1964-1977) 95 (<1950)	70 PMA (70 if individual author not identified in released version)	No	Less if individual author not identified, otherwise no change
12	Audiovisual works >1977, created as works made for hire	Lesser of 75 from publication or 100 from creation	Lesser of 95 from publication or 120 from creation	70 PMA of principal director, screenplay author, dialogue author, or composer	No	No change
13	Audiovisual works <1978, created as works made for hire	28;47 (1950-1963) 75 (1964-1977) 75 (<1950)(if in renewal term on 1/1/78)	28;67 (1950-1963) 95 (1964-1977) 95 (<1950)(if in renewal term on 10/27/98)	70 PMA of principal director, screenplay author, dialogue author, or composer	No	No change

#	Nature of Work and Author	Pre-CTEA Term	Post-CTEA Term	Directive Term in EU	Harmonised?	More or Less?
14	Film Producers	No rights under copyright unless authors or assignees of authors	No rights under copyright unless authors or assignees of authors	"Related rights" expire at sooner of 50 years from first publication or first communication to public	No	No change
15	Broadcasting Organizations	No rights under copyright unless authors or assignees of authors	No rights under copyright unless authors or assignees of authors	"Related rights" expire 50 years after transmission	No	No change
16	Sound Recordings >1977	75 or 50 PMA, depending on nature of author	95 or 70 PMA, depending on nature of author	"Related rights" expire 50 years from sooner of first publication or first communication to public	No	Less
17	Sound Recordings 1972-1977	75	95	"Related rights" expire 50 years from sooner of first publication or first communication to public	No	Less

#	Nature of Work and Author	Pre-CTEA Term	Post-CTEA Term	Directive Term in EU	Harmonized?	More or Less?
18	Sound Recordings <1972	State law until 2047	State law until 2067	"Related rights" expire 50 years from sooner of first publication or first communication to public	No	Less
19	Unpublished works on which copyright has expired	0	0	25 from publication	No	No change
20	Unpublished works <1978 not previously copyrighted or in the public domain	Greater of 50 PMA or until 2003; if published before 2003, greater of 50 PMA or until 2028	Greater of 70 PMA or until 2003; if published before 2003, greater of 70 PMA or until 2048	70 PMA	Partially (harmonized for relatively recent works, not for older works)	More for recent works, less for older works

Sources: The columns for Pre- and Post-CTEA Terms are taken from sections 302-304 of the Copyright Act, 17 U.S.C. §§ 302-304, in each case as amended by the CTEA. The column Directive Term in the EU is based on the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, 19 OJL 290.